UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 9

UNITED STEEL, PAPER AND FORESTRY
RUBBER, MANUFACTURING, ENERGY
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
LOCAL 5668
(Constellium Rolled Products Ravenswood, LLC)

and CASE 09-CB-257509

CONSTELLIUM ROLLED PRODUCTS
RAVENSWOOD, LLC

POST-HEARING BRIEF OF RESPONDENT UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 5668

UNITED STEELWORKERS
Nathan Kilbert
60 Blvd. of the Allies, Room 807
Pittsburgh, PA 15222
Telephone (412) 562-2548
Fax (412) 562-2574
Email nkilbert@usw.org
Attorney for Union

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

The General Counsel improperly seeks to punish the Respondent (hereafter, "Union") for lawfully declining to respond to requests for information, made on the eve of an arbitration, that sought documents "which show or are evidence that" or "on which it relies to show" certain factual propositions key to the arbitration proceeding. This position directly contradicts controlling decisions of the Board, most notably *Hamilton Park Health Care Center*, 365 NLRB No. 117 (2017), *Oncor Electric Delivery Company, LLC*, 364 NLRB No. 58 (2016), and *California Nurses Association*, 326 NLRB 1362 (1998), that bar pre-arbitral discovery. Employers and unions have no obligation to respond to requests for information that "delves into litigation strategy and preparation." *Hamilton Park*, 365 NLRB No. 117, slip op. at 8. The Union had no obligation to respond to these information requests seeking the evidence upon which it would rely at the arbitration, so its refusal to respond was not unlawful.

The General Counsel also alleges that the Union refused to produce other information, but the Union in fact produced the information requested on March 9, less than three weeks after the information request. The Union initially responded that it did not have any information responsive to the request one week after the request, and it updated its response on March 9, within a reasonable period of time after the initial request. Its actions with respect to this second allegation were therefore lawful, and the Complaint should be dismissed in its entirety.

II. STATEMENT OF FACTS

A. The collective bargaining agreement provides for retiree medical benefits.

The Union is a labor organization that acts as an agent of the International Union that represents a unit of production and maintenance employees at the West Virginia facility of Constellium Rolled Products Ravenswood LLC ("Constellium") in administering the collective

bargaining agreement between the International Union and Constellium ("CBA," J. Ex. 1; G.C. Ex. 2; Tr. 9).[1]

Under the CBA, certain employees who retired from the unit were entitled to health insurance provided by Constellium. (CBA, p. 203-204). Constellium's responsibility for the premiums for that insurance was governed by a "cap letter" incorporated into the CBA. (*Ibid.*). At paragraph (a), the cap letter provided, in relevant part, that "[t]he average annual Company contributions to be paid for all health care benefits per participant who retires on or after January 1, 2003 shall not exceed $13,007 for participants under the age of 65." (*Id.*, p. 203). Paragraph (b) made amounts in excess of this cap the responsibility of the retirees. (*Ibid.*) But paragraph (c) limited that responsibility under certain circumstances, providing, in relevant part, as follows:

> Notwithstanding the foregoing, no participant shall be obligated to contribute for such excess health care costs until January 1, 2011 with the exception of the $250.00 per month supplement payable to age 65 that was provided under the terms of the 2002 Agreement in order to cover any retiree medical contributions. In addition, it is agreed that this amount will also be made available for those employees who retire on or before the expiration of the new agreement. For such retirees receiving this supplement, the retiree will pay up to $250.00 per month for the amount in excess of $13,007 for the retiree, and the retiree's spouse and/or other dependent participant who is or are under the age of 65.

(*Ibid.*).

The Union believed that paragraph (c) of the cap letter meant that pre-65 retirees' monthly responsibility for health insurance premiums could not exceed $250. (Tr. 101-102). Constellium believed that paragraph (c) did not have the limiting effect alleged by the Union;

[1] This brief utilizes the following abbreviations when referring to the record: J. Ex. denotes a joint exhibit; G.C. Ex. denotes an exhibit offered by the General Counsel; R. Ex. denotes an exhibit offered by the Respondent; and Tr. denotes a reference to the transcript.

rather, they believed that retirees were responsible for all amounts in excess of the $13,007 figure. (Tr. 103).

B. The Union filed a grievance relating to retiree medical insurance premiums and the grievance was set for arbitration on February 27, 2020.

On June 7, 2019, the Union filed a grievance alleging that Constellium had violated the CBA by requiring pre-65 retirees to contribute more than $250 monthly toward their health insurance. (J. Ex. 2, p. 1).

The Union attached to this grievance an undated letter (the "summary document") on the letterhead of a predecessor to Constellium, Pechiney Rolled Products ("Pechiney") and signed by James Guillow, Pechiney Vice President of Human Resources. (J. Ex. 2, p. 2). This undated letter was titled "Proposed Retiree Health Care Summary" and stated that "No retiree has to pay anything for health care during the life of the Agreement with the exception of the $250 per month supplement payable to age 65 . . . In other words, retirees pay $0." (*Ibid.*). The summary document went on to say "For such retirees receiving this supplement, the retiree who is under the age of 65 will pay no more than $250 per month once the cap is exceeded. The retiree's spouse and/or other dependent do not pay this $250 per month." (*Ibid.*). King testified that at the meeting where the grievance was discussed, the Union "relied upon" the summary document "to basically prove their case." (Tr. 53).

Constellium denied the grievance in writing on July 11, 2019. (J. Ex. 3). The Union appealed the grievance to arbitration on August 2, 2019. (G.C. Ex. 3). The grievance was scheduled to be heard by Arbitrator Kenneth Frankland on February 27, 2020. (J. Ex. 4; R. Ex. 6).

C. On February 18, Constellium requested certain information from the Union "which show or are evidence" or "on which [the Union] relies" to show certain facts.

Nine days before the scheduled date of the arbitration, and seven and a half months after the grievance was appealed to arbitration, Matthew King ("King"), Senior Labor Relations Manager at Constellium, wrote to the Union requesting information related to the grievance and the evidence on which the Union relies. (J. Ex. 4). In a bulleted list dated February 18, Constellium requested five items of information, of which four are at issue in this case:

1. All documents in the Union's possession or under its control which show or are evidence that the "Pechiney Rolled Products Proposed Retiree Health Care Summary" signed by Jim Guillow ever became a part of any labor agreement or became an agreed upon modification of any existing agreement;
2. All documents in the Union's possession or under its control which show or are evidence that the "Pechiney Rolled Products Proposed Retiree Health Care Summary" signed by Jim Guillow was ever signed or accepted in writing by the Union;
3. All documents in the Union's possession or under its control that relate to the subject of retiree health care costs that are in excess of the cap set forth in the cap letters appended to the 2010, 2012, and 2017 labor agreements being passed on to retirees;
4. All documents in the Union's possession or under its control on which it relies to show that the excess retiree health care costs (meaning those costs in excess of the caps set forth in the cap letters) were ever intended by the Company and Union to limit retiree costs to $250 per month;

(*Ibid.*).[2] The first two requests dealt with the summary document upon which King testified the Union had relied to prove its case. (Tr. 53). King testified at the hearing that Constellium requested that request number four was "the whole case." (Tr. 68). Indeed, the question of the parties' intended meaning of the cap letter was the central question of the arbitration. (Tr. 47-49; 101-103).

[2] The original request consisted of a bulleted list. For ease of reference to specific requests, those requests are numbered here.

King wrote an email on February 24 following up on the request. (R. Ex. 2). In this email, he stated that "the information we have requested is necessary to prepare for our arbitration on Thursday and Friday of this week." (*Ibid.*). He went on to say "we reserve the right to move to exclude any evidence you present at the arbitration that should have been provided in response to this request." (*Ibid*.).

D. The Union responded to the information request on February 25.

One week after receiving the request, on February 25, International Union Staff Representative Brian Wedge ("Wedge") provided the Union's initial response to the February 18 information request.[3] (J. Ex. 5). In this response, Wedge objected to items 1, 2, and 4 as improper pre-arbitral discovery. (*Ibid*.). With respect to item 3, Wedge provided a response, stating that the Union did not have documents matching that description. (*Ibid.*).

E. Constellium objected to the Union's response, and Arbitrator Frankland ruled that the requests were improper pre-arbitral discovery.

Christopher Slaughter ("Slaughter"), Constellium's attorney, wrote to the arbitrator on February 25 to request a postponement of the hearing while the Union and the Company tried to resolve a dispute "about information the Company requested from the Union for use in preparing for the arbitration." (R. Ex. 7, p. 2). The Union declined to agree to the postponement in an email later that day. (*Ibid*.) Arbitrator Frankland stated, via email, that he would deal with the issue first thing at the hearing on February 27. (*Id.*, p. 1-2). Slaughter then wrote another email complaining "The union has refused to provide information the company needs to prepare its case." (*Id.*, p. 1).

[3] The parties have stipulated that Wedge was acting as the Union's agent for the purpose of responding to the February 18 information request. (Tr. 10).

King wrote an email to the Union on February 26 denying that the requests constituted pre-arbitral discovery. (R. Ex. 3). In this email, King explained that in its recent information request, "[t]he Company sought documents that are evidence, not mental impressions and strategy." (*Id.*, p. 1).

On February 27, after the parties had agreed to continue the actual arbitration on the merits to a future date in order to permit settlement discussions,[4] Slaughter presented to Arbitrator Frankland the issue of the Union's response to the information requests. (R. Ex. 6, p. 5).[5] He characterized Constellium's request as seeking "evidence" and stated that it asked "whether they have evidence that they believe bears on their argument and supports their argument." (*Ibid.*). Wedge again objected to the request as seeking improper pre-arbitral discovery, and stated "I don't think it's something that eight days before the arbitration I should hand my play book over to the opponent." (*Id.*, p. 6). Arbitrator Frankland stated that he would, at Constellium's request, provide a written ruling on the matter of the information requests. (*Id.*, p. 13).

F. Arbitrator Frankland ruled that requests 1, 2, and 4 were improper pre-arbitral discovery.

Arbitrator Frankland's subsequent ruling, made March 3, adopted the Union's position with respect to the requests that the Union urges to be improper pre-arbitral discovery in this case. (J. Ex. 6). Arbitrator Frankland began by recounting the circumstances that led to the advisory opinion: "[I]n lieu of filing a ULP that undoubtedly would take many months to decide,

[4] Constellium ultimately declined ever to make any settlement proposal subsequent to the parties' agreement to defer the hearing on February 27 in order to engage in settlement discussions. (Tr. 90).

[5] Respondent Exhibit 6 is a transcript of the February 27 hearing. References are to page numbers within the transcript.

the Company, with concurrence by the Union seeks this alternative, the views of the arbitrator." (*Id.*, p. 2).

Arbitrator Frankland focused on the rule prohibiting pre-arbitration discovery as articulated by the Board in *Hamilton Park Health Care Center*, 365 NLRB No. 117 (2017), quoting the critical passage:

> Thus, in relationship to the ban on prearbitration discovery, the Board focuses on the nature of the information requested, making a distinction between information that delves into litigation strategy and preparation which is deemed improper prearbitration discovery, as opposed to substantive information pertaining to the issues at arbitration, which must be produced.

(*Id.*, p. 3 (*quoting Hamilton Park*, 365 NLRB No. 117, slip op. 8)). He found that requests 1, 2, and 4 constituted improper pre-arbitration discovery. (*Id.*, p. 3-5). Specifically addressing the first request, Arbitrator Frankland observed that it seems to him that "the Company does not believe there is an enforceable agreement and wants the Union to provide proof of an agreement." He stated that how the Union proposes to carry its burden of proof is "litigation strategy and is not discoverable." (*Id.*, p. 3-4). With respect to items 2 and 4, he said that his analysis for those requests was similar to request 1: the requests "delve[] into litigation strategy" and are not appropriate. (*Id.*, p. 4-5).

Constellium filed the instant charge the day after Arbitrator Frankland rendered this opinion. (Tr. 90).

G. The Union provided responsive information to request 3 on March 9, to which Constellium lodged no objection.

After identifying documents responsive to Constellium's request, the Union provided an updated response to request 3 on March 9. (J. Ex. 7). The documents provided consisted of eleven pages of letters to and from Constellium officials that were already in the possession of Constellium. (J. Ex. 7, p. 9-19; Tr. 98-100, 114).

King admitted at trial that Constellium never voiced any objection to the timing or adequacy of this March 9 response to request 3. (Tr. 89-90). The arbitration eventually went forward on August 26. (Tr. 40).

III. ARGUMENT

A. The Union had no obligation to respond to requests 1, 2, and 4 because they constituted improper pre-arbitral discovery.

The Union was justified in refusing to respond to requests 1, 2, and 4 because each of those requests constituted improper pre-arbitral discovery. It is "well settled that there is no general right to pretrial discovery in arbitration proceedings."[6] *Calif. Nurses Ass'n*, 326 NLRB 1362, 1362 (1998). In *California Nurses*, the Board specifically held that a party did not violate the Act when it refused to disclose "the evidence on which it intends to rely, at the arbitration hearing." *Ibid.*; *see also Oncor Elec. Delivery Co., LLC*, 364 NLRB No. 58, slip op. at 21 (2016) (a party cannot request "information about the other parties' planned presentation of its case before the arbitrator"). More recently, the Board approved the "[I]information that delves into litigation strategy and preparation . . . is deemed improper prearbitration discovery." *Hamilton Park*, slip op. at 8. Requests 1, 2, and 4 each fell within that category, so the Union had no obligation to respond to them.

Request 4 could not be a clearer example of a request for pre-arbitral discovery, as it asks for the same information held to be improper in *California Nurses*. In request 4, Constellium sought information "on which [the Union] relies to show that the excess retiree health care costs

[6] Because the request in the instant case was made well after the grievance had been referred to arbitration (indeed, nearly on the eve the hearing), cases involving information requests at earlier stages in the grievance proceeding are inapposite. *See Pulaski Constr. Co.*, 345 NLRB 931, 937 (2005) (finding information request not improper attempt at discovery when the grievance was not pending arbitration at the time of the request); *Ormet Aluminum Mill Prods. Corp.*, 335 NLRB 788, 789-790 (2001) (differentiating between pre-arbitration requests and those made at earlier stages of the grievance procedure).

(meaning those costs in excess of the caps set forth in the cap letters) were ever intended by the Company and Union to limit retiree costs to $250 per month." (J. Ex. 4). In this request, Constellium came out and said that it wanted information about the Union's litigation strategy: namely, those documents that the Union relied upon to show parties' intentions regarding retiree health care costs. This question was, as King testified, "the whole case." (Tr. 68). There is no way to read the request other than as a request for all of the documentary evidence that the Union would introduce to prove this point at arbitration. Under *California Nurses*, it was therefore an improper request. 326 NLRB at 1362.

Requests 1 and 2 do not use the same phrase, but the import is just as clear. Each of those requests sought documents that "show or are evidence" of important facts regarding the summary document. (J. Ex. 4). Request 1 asked for documents that "show or are evidence" that the summary document became part of a labor agreement. Request 2 asked for documents that show or are evidence that the summary document was signed or accepted by the Union. Each of these factual propositions were quite significant issues in the case, as the Union had attached the summary document to its grievance and argued that the summary document supported its position on the issue of the meaning of the cap letter. (Tr. 53; J. Ex. 2).

By asking for all documents that "show or are evidence" of these critical issues, the effect of Constellium's request was to compel the Union to disclose in advance all of the documentary evidence the Union would introduce at arbitration to support these points. Indeed, King made this point explicit in his email of February 26, where he stated that Constellium "reserve[d] the right to move to exclude any evidence you present at the arbitration that should have been provided in response to this request." (R. Ex. 2).

Because these requests seek only evidence in favor of the particular factual propositions, and not merely documents that relate to the subject matter, they could force the Union to disclose information about its legal strategy. If the Union and Constellium both possessed a document that was ambiguous on its face as to whether was evidence of the factual propositions in requests 1 and 2, forcing the Union to respond to these information requests would force the Union to disclose to Constellium whether the Union believed that the ambiguous document was evidence in favor of those disputed factual propositions. Constellium would thereby gain an invaluable window into the Union's legal strategy and be prepared to meet it.

Indeed, Constellium repeatedly stressed that it was seeking "evidence" in these information requests and that Constellium needed the Union's responses in order to prepare its case for arbitration. King's February 24 email stressed that "the information we have requested is necessary to prepare for our arbitration." (R. Ex. 2). Slaughter made the same point in two emails the following day. (R. Ex. 7). At the February 27 hearing, Slaughter said again that Constellium's request was asking "evidence" and, critically, he stated that Constellium had asked "whether [the Union] have evidence that they believe bears on their argument and supports their argument." (R. Ex. 6, p. 5). This last statement is an admission that the purpose of the information request was to gather information about the evidence that the Union believed was relevant and that the Union believed supported its case – that is, about the Union's litigation strategy.

Although the Board is not in any sense bound by Arbitrator Frankland's decision, it should be noted that he reached precisely the same conclusion as the Union with respect to these information requests. On March 3, after having heard Slaughter's arguments and reviewed the

case law, he ruled that requests 1, 2, and 4 were improper pre-arbitral discovery. (J. Ex. 6, p. 3-5). With respect to request 1, the arbitrator observed that

> The purport of this request seems to me to be that the Company does not believe there is an enforceable agreement and wants the Union to provide proof of an agreement. The Union has the burden of persuasion by a preponderance of the evidence to establish such an agreement in the first instance. How the Union proposes to carry that burden is litigation strategy and is not discoverable.

(J. Ex. 6, p. 3). He went on to say that the same applied to requests 2 and 4. (*Id.*, p. 4-5). This trenchant analysis cuts to the core of the case.

It is worth considering that Constellium did not ask the Union to produce all documents that related to the summary document, which would likely have been a proper request under existing Board law.[7] Instead, it asked the Union only to produce those documents that were evidence in favor of these particular factual propositions or upon which it relied to show these factual propositions. A ruling that these requests were proper would open the door to abusive pre-arbitration discovery. A party could simply make a list of all the factual or legal points that its opponent would need to establish in order to prevail at arbitration and then submit requests for all documents that "show or are evidence" of those points. The result would be that the recipient would be forced to disclose all of their evidence and provide a roadmap to their arbitration case. Although this is what the General Counsel seeks, it would render the Board's well-established prohibition on pre-arbitral discovery a dead letter and is foreclosed by Board precedent. *Calif. Nurses*, 326 NLRB at 1362.

B. The Union did not unreasonably delay its response to request 3.

The Union did not violate the Act with respect to request 3 because it made an initial response on February 25, one week after the initial request, and an additional response on March

[7] Indeed, the Union did not object to request 3, which sought documents that merely related to the subject of retiree health benefit costs being passed on to retirees.

9, less than three weeks after the initial request. A party must make a "reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 n.9 (1993). A determination of the reasonableness of a delay requires review of all the relevant circumstances, including "the complexity and extent of the information sought, its availability and the difficulty in retrieving the information." *Allegheny Power*, 339 NLRB 585, 587 (2003). The Board has often found unexplained delays of six or seven weeks to be unreasonable. *See, e.g.*, *Woodland Clinic*, 331 NLRB 735, 737 (2000) (seven week delay unlawful); *Bituminous Roadways of Colo.*, 314 NLRB 1010, 1014 (1994) (six week delay unlawful); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (six week delay unlawful); *Quality Engineered Prods.*, 267 NLRB 593, 598 (1983) (delay of six weeks unlawful); *Local 12 Engineers*, 237 NLRB 1556, 1558-1559 (1978) (delay of six weeks unlawful). But those are a far cry from the instant case, where the delay from February 18 to March 9 was less than three weeks.

Here, the Union initially responded to Constellium's information request on February 25, one week after it was sent to the Union on February 18. (J. Ex. 5). The Union explained that it did not have responsive documents. (*Id.*). However, the process of reviewing documents in preparation for the arbitration was ongoing: Wedge told Arbitrator Frankland on February 27 that the Union had still been reviewing its files and pulling out documents the day before. (R. Ex. 6, p. 10-11). On March 9, after the arbitration had been indefinitely delayed on February 27, and less than three weeks after the initial information request, the Union produced additional information.[8] (J. Ex. 7). Constellium did not object to the information provided on March 9. (Tr. 89-90).

[8] The Union anticipates that the General Counsel may argue that the Union's February 25 response that it did not have documents responsive to the request was untruthful. There is no evidence that this was the case beyond speculation and innuendo. The General Counsel has not

Under the circumstances, there is no cause to find that the Union violated the Act: it timely responded to the information request, and it subsequently supplemented that response within less than three weeks of the original request.

IV. CONCLUSION

The General Counsel has not met its burden of establishing that the Union violated the Act in any respect. To the contrary, the information requests numbered 1, 2, and 4 were pre-arbitral discovery to which the Union had no obligation to respond. Indeed, counsel for Constellium baldly stated that the purpose of the requests was to see "whether they [the Union] have evidence that they believe bears on their argument and supports their argument," (R. Ex. 6, p. 5), that is, to discover the Union's litigation strategy. Holding that the Union had an obligation to respond to these information requests would eviscerate the Board's well-established prohibition on pre-arbitration discovery.

With respect to request three, the General Counsel failed to establish that the Union delayed unreasonably in providing the information. To the contrary, the Union made an initial response one week after receipt of the information request and a full (and evidently satisfactory response) less than three weeks after the request.

In view of the foregoing, the Union asks that the Complaint be dismissed in its entirety.

Respectfully submitted,

/s/Nathan Kilbert
Nathan Kilbert

Counsel for Respondent

---

rebutted the obvious alternative explanation: that the Union found the documents after its initial February 25 response and subsequently provided them to Constellium.

CERTIFICATE OF SERVICE

I, Nathan Kilbert, hereby certify that on this 12th day of November 2020, a true and correct copy of the foregoing was served upon the following via electronic mail:

Matthew Denholm
Regional Director
National Labor Relations Board, Region 9
The Federal Building
550 Main Street, Room 3003
Cincinnati, Ohio 45202
Matthew.denholm@nlrb.gov

Brendan Keough
Senior Trial Attorney
National Labor Relations Board, Region 5
100 S. Charles Street, Room 600
Baltimore, Maryland 21201
Brendan.keough@nlrb.gov

Christopher Slaughter
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, West Virginia 25722
Chris.slaughter@steptoe-johnson.com

Respectfully submitted,

/s/Nathan Kilbert
Nathan Kilbert

Counsel for Respondent